THE ASSISTED DECISION MAKING (CAPACITY) BILL 2013: A STEP IN THE RIGHT DIRECTION BUT DOES IT GO FAR ENOUGH?

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A INTRODUCTION

It is said that disability is the last frontier in the struggle for civil rights.¹ Within this debate, is the well supported argument that almost every person is capable of expressing their will and preferences with the right support provided to them.² Ireland's Assisted Decision Making (Capacity) Bill 2013 (the Bill), introduced to enable Ireland to ratify the Convention on the Rights of Persons with Disabilities,³ is currently before the committee stage of the Dáil. The Bill sees the abolition of the much outdated current ward of court system, and the inclusion of an automatic review of those currently under wardship. The Bill moves away from the ‘best interests’ principle, which has been interpreted in a paternalistic way by the Irish courts, and moves towards the will and preferences model. Notwithstanding these positive moves forward by the Bill, there are still some concerns with the provisions of the Bill. In this article the Bill shall be assessed from a human rights perspective, in particular its conformity with the CRPD. Beginning with a brief outline of the definition of capacity within the Bill, pointing out any problems with the definition before moving on to look specifically at Informal Decision Making, Co-Decision Makers and Decision Making Representatives under the Bill and the problems which these provisions may present.

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² ibid 84.

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B CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Persons with disabilities became explicitly recognised in international law when the UN General Assembly adopted the Declaration on the Rights of Mentally Retarded Persons 1971⁴ and the Declaration on the Rights of Disabled Persons 1975.⁵ These, however, were non-binding ‘soft law’ instruments. The World Programme of Action Concerning Disabled Persons (WPA) was adopted by the UN in 1981. One of the WPA’s goals was the equalisation of opportunities for people with disabilities.

The WPA is explicitly acknowledged as one of the antecedents to the CRPD.⁶ The creation of the CRPD has been greeted as a great landmark in reframing the needs and concerns of persons with disability in the context of human rights.⁷ The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.⁸ According to the preamble of the CRPD, disability is an evolving concept. It is also important to note that the CRPD does not equate disability with lack of mental capacity.⁹ The Bill is consistent with this as it does not equate a lack of capacity with having a disability.¹⁰

The CRPD does not create any new human rights, but simply applies existing human rights to the circumstances of persons with disability.¹¹ A crucial provision of the CRPD is Article 12. This is because Article 12 is inextricably linked to the enjoyment of so many of the other rights.

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⁷ ibid 2.
⁸ CRPD (n 3) Article 1.
¹⁰ ibid.
¹¹ Kayes and French (n 6) 20.
provided for in the CRPD. Article 12 provides for the equal recognition before the law of persons with disability. This cannot be derogated from, even in times of war, as per Article 4 Paragraph 2 of the International Covenant on Civil and Political Rights. This is covered under Article 4 of the CRPD which states that nothing in the Convention shall derogate from existing international law.

Under Article 12 States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law and that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Article 12 also provides that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Further to this, States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law which shall respect the will and preferences of the person, apply for the shortest time possible, are subject to a regular review by a competent body and are proportional to the degree to which such measures effect the person's rights and interests. Subject to the provisions of Article 12, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property. The text of Article 12 doesn't explicitly require the abolition of substituted decision making but it switches the focus from deficits to supports that all people use in exercising legal capacity.

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13 CPRD (n 3) Article 4(4).
14 Flynn and Arstein-Kerslake (n 1) 89.
Legal capacity is the ability to hold rights and to be an actor under the law.\textsuperscript{15} As mentioned earlier, if a person is not afforded legal capacity then their achievement of other rights provided by the CRPD will be hindered also. Some of these other rights include, but are not limited to, the right to equality and non-discrimination under Article 5, the right to accessibility under Article 9, access to justice under Article 13, liberty and security of the person under Article 14, and living independently and being included in the community under Article 19. In addition to this, certain restrictions on legal capacity are seen as violations of Articles 5, 6 and 8 of the ECHR.\textsuperscript{16}

C DEFINITION OF CAPACITY

Section 3 of the Bill states that a person's capacity shall be assessed on their ability to understand the nature and consequences of a decision to be made by them in the context of the available choices at the time the decision is made. A person lacks capacity to make a decision if they are unable to understand the information relevant to the decision, to retain that information, to weigh that information as part of the process of making the decision or to communicate their decision. An explanation should be given to the person in a way which is appropriate to them. The fact that a person can only retain the relevant information for a short period of time does not prevent them from being regarded as having the capacity to make the decision.

The Bill continues to assume that a certain standard of mental capacity is a prerequisite to having legal capacity.\textsuperscript{17} This is not compatible with Article 12 of the CRPD. Under the Bill,

\textsuperscript{16} ibid 140.
\textsuperscript{17} ibid 134.
there is a presumption of capacity. According to Bach and Kerzner, this presents a problem, in that a presumption is rebuttable.\textsuperscript{18}

Therefore, the legal recognition and associated rights can be withdrawn and restricted. Another concern which has been raised, by the College of Psychiatrists of Ireland, is that the definition is unclear on how long an individual must retain the information.\textsuperscript{19} They also provided a good suggestion which may help on clearing up the matter. If section 3(2)(b) was amalgamated with section 3(2)(c) to read ‘to retain that information for long enough to use or weigh that information as part of the process of making the decision’.

D INFORMAL DECISION MAKING

The provisions of the Bill which provide for Informal Decision Making are the ones which cause the most concern. They may lead to a system of substituted decision making without any safeguards in place to protect the person for whom the decision is made.

1 Outline of Provision

Part 7 of the Bill deals with informal decision makers on personal welfare matters, apart from issues closely connected with non-therapeutic sterilisation, withdrawal of artificial life sustaining treatment or organ donation. This, in effect, mirrors the general defence under sections 5 and 6 of the Mental Capacity Act 2005.\textsuperscript{20} Under section 53 of the Bill a person may take or authorise the taking of an action in respect of the personal welfare of the relevant person.


\textsuperscript{20} Mental Capacity Act 2005 (England & Wales).
An Informal Decision Maker shall not incur any legal liability which they would not have incurred if the relevant person had the capacity to consent in relation to the action, or had given consent to the informal decision maker to take or authorise taking action. An informal decision maker is also indemnified for expense incurred. As per section 53(6), an informal decision maker has the same powers of restraint as a decision making representative. Section 54 of the Bill deals with the limitations on the powers of an informal decision maker.

2 Problems with Informal Decision Making

Notwithstanding the CRPD silence on substituted decision making, the Committee on the Rights of Persons with Disabilities has been clear on its view of the matter. In its first general comment,\(^{21}\) the committee stated that States parties must review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substituted decision making by supported decision making, which respects the persons’ autonomy, will and preferences.\(^{22}\) The Committee’s use of the word ‘replace’ suggests that systems allowing substituted decision making to work alongside supported decision making are in contravention with Article 12 of the CRPD.\(^{23}\) Furthermore, Article 31 of the Vienna Convention requires a treaty to be read in light of its object and purposes.\(^{24}\) In the view of Amnesty International, a person should not be allowed to make a decision for someone else, outside of the facilitated decision making process.\(^{25}\)

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\(^{21}\) CRPD/C/GC/1.
\(^{22}\) ibid para 26.
\(^{25}\) Amnesty International & The Centre for Disability Law & Policy 2011, Principle 10(e).
A further problem, which presents itself, is that there is no obligation for informal decision makers to consult with family members of the relevant person.\(^{26}\) This, in combination with a lack of safeguards, such as a reporting procedure,\(^{27}\) which are required under Article 12(4) of the CRPD, may lead to this provision being used as de facto substituted decision making. This also leads to a fear that these powers could be abused in practice.\(^{28}\) Bach and Kerzner have said that the line between giving advice and making choices for another person is one which is easily crossed.\(^{29}\)

This lack of safeguards, present particular concern in relation to the restraint powers provided for under section 53(6). Section 27(5)(a) states that a person shall not do an act intended to restrain unless the relevant person lacks capacity in relation to the matter in question or the decision making representative reasonably believes that the relevant person lacks such capacity. This could be an arbitrary assessment of capacity which could lead to an unlawful deprivation of liberty as provided by Article 14 of the CRPD. On the other side, it is also argued that the Bill fails to address key issues faced by informal decision makers.\(^{30}\) For example, a carer who wishes to lock the door if a confused person with dementia repeatedly tries to walk outside at night.

In conclusion, it is submitted that informal decision making under the Bill could be used as a back door to substituted decision making which is in contravention with Article 12 of the CRPD.


\(^{27}\) Kelly (n 9) 12.


\(^{29}\) Bach and Kerzner (n 18) 77.

\(^{30}\) Kelly (n 9) 12.
CO-DECISION MAKING

While the introduction of provision for co-decision making in the Bill is a step in the right direction, towards replacing substituted decision making with supported decision making, there are still some drawbacks to this area of the Bill which need to be addressed.

1 Outline of Provision

Chapter 4 of the Bill deals with co-decision making. Under section 18(1) of the Bill, a person who has reached the age of 18 years and who considers that their capacity is in question, or may shortly be in question, may appoint a suitable person, who has also reached that age, to jointly make with the first person one or more than one decision on the first person's personal welfare or property and affairs. A person is suitable for appointment as a co-decision maker if they are a relative or friend who has had such personal contact with the proposed appointer over such a period of time that a relationship of trust exists between them. An appointment is made in a co-decision making agreement. As per section 17(3)(a), a co-decision making agreement has no effect unless it is subject of a co-decision making order. An application to the Circuit Court is necessary for a co-decision making order. An appointer may appoint more than one person as a co-decision maker, but they may not appoint more than one person in respect of the same relevant decision. A co-decision maker for the appointer shall advise the appointer respecting matters the subject or to be the subject of relevant decisions, and shall share with the appointer the authority to make relevant decisions and may do all things necessary to give effect to the authority vested in them. Where a relevant decision requires the signing of any document for its implementation, the document is void unless the appointer and the co-decision maker co-sign the document. A co-decision maker shall not refuse to sign a document if two conditions are met. Firstly, a reasonable person could have made that relevant
decision and secondly, no harm to the appointer or any other person is likely to result from that relevant decision.

2 Problems with Co-Decision Making

According to the Committee's general comment, supported decision making must be available to all.31 As section 18(1) states that a person who considers their capacity to be in question, or may shortly be in question, may appoint a co-decision maker, this does not fit the requirement that supported decision making must be available to all. It suggests that the main group affected will be those with impaired decision making abilities and in turn cognitive disabilities.32

The need to apply to the Circuit Court to have a co-decision making order granted is likely to place a great demand on court resources.33 As the cases are not in public, there is also concern about the consistency of court decisions. There is no obligation on the Circuit Court to terminate the co-decision making order upon an application to do so. This means a person may be stuck in a co-decision making agreement for longer than they wish to be.34 This is in contravention with the view of the Committee in their general comment. They stated that the person must have the right to refuse support and terminate or change the support relationship at any time.35

Another concern is that co-decision making could be used as a vehicle for substituted decision making without the same safeguards which apply to more serious impediments to an

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31 CPRD (n 21) para 29(a).
32 Flynn and Arstein-Kerslake (n 15) 134.
33 Kelly (n 9) 12.
34 Series (n 26).
35 CPRD (n 21) para 29(g).
individual's liberty. The use of the term 'reasonable person' and the no harm requirement in section 19 have been said to act not as a gateway to substituted decision making, but as a gateway to substituted refusal. The outcome approach of assessing capacity, used in this section, is contradictory to section 3 of the Bill which states that a person's capacity is to be assessed functionally. This approach has also been criticised for its failure to afford persons with disabilities the dignity of making mistakes and taking risks on an equal basis as persons without disabilities.

Series argues that the restriction on the number of people appointed per decision type to one is unnecessary. She contends that there are attractions to having more than one, per type of decision. First of all, she claims problems could arise when a decision needs to be made with haste and the co-decision maker is unavailable. Secondly, she states that with 'reasonableness' being a subjective standard, what one co-decision maker might find unreasonable and refuse to acquiesce to, another may find perfectly reasonable.

A final problem identified with co-decision making, is that there is no provision in place for people with no naturally occurring support networks. It is possible to appoint a co-decision maker for a person who lacks these support networks, as can be seen by the law in Alberta and Saskatchewan. Under Article 12(3) of the CRPD, the State owes a duty to an individual, to take steps to develop relationships as a basis for the support they need.

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37 Series (n 26).
38 Doyle and Flynn (n 23) 174.
39 Series (n 26).
40 Series (n 26).
41 Bach and Kerzner (n 18) 85, 86.
42 Bach and Kerzner (n 18) 92.
In conclusion, it is put that the co-decision making provisions of the Bill are too problematic and are still in need of some modification in order to ensure that they afford the appointers the protection they have a right to under the CRPD.

F DECISION MAKING REPRESENTATIVES

The provisions of the Bill outlining decision making representatives provide for a system of substituted decision making. Unlike informal decision making, there are safeguards in place as to the powers of decision making representatives. Notwithstanding these safeguards, concerns still present themselves with regard to how these provisions would work in practice.

1 Outline of Provision

Section 23(2)(b) of the Bill sets out that the court may appoint a decision making representative, following a declaration under section 15(1)(b) that the relevant person lacks capacity, even if the assistance of a co-decision maker were made available to them. As per section 23(3) of the Bill, where no suitable person is willing or able to act as a decision making representative, the court shall request the Public Guardian to nominate two people from the panel established under section 61(1), and the court may appoint one of these nominees to act as a decision making representative for the relevant person. Section 24(2) sets out the criteria which exclude a proposed appointee from becoming a decision making representative. These include, but are not limited to, the proposed appointee not having reached the age of 18; the proposed appointee has been convicted of an offence in relation to the person or property of the relevant person or the person or property of a child of the relevant person; a safety or barring order has been made against the proposed appointee in relation to the relevant person. Section 27 provides restrictions on the powers of a decision making representative. A decision making representative cannot stop a person from seeing the relevant person, they shall not without the
express approval of the court exercise any powers in relation to the settlement of any part of
the property of the relevant person, and they shall not have the power to refuse life sustaining
treatment on behalf of the relevant person. Section 27(5) of the Bill deals with the powers of
restraint that a decision making representative may exercise.

2 Problems with Decision Making Representatives

The first problem which presents itself is the fact that this is a substituted decision making
regime. There is a three step test for defining a substituted decision making system. 43 Firstly,
legal capacity is removed from the relevant person, even if only in respect of one decision.
Secondly, a decision making representative can be appointed by someone other than the
relevant person. Finally, any decision made is bound by what is believed to be in the objective
‘best interests’ of the relevant person, as opposed to their own will and preferences. It is
contended that the provisions for decision making representatives, under the Bill, satisfy these
three criteria. Amnesty International state that substituted decision making should be used as a
last resort, and only where the will and preferences of the relevant person are unknown after
all supports have been considered. 44 Series argues that notwithstanding the safeguards in place,
this regime is likely to be a worry for the CRPD Committee. 45

Under the Bill, the decision making representative can be someone who is a stranger to the
relevant person. This is in direct contrast with regimes in countries such as France, Greece and
Hungary, all of whom have ratified the CRPD, where people can choose their own guardian.
Series points to a 2011 Report by the EU Agency for Fundamental Rights which stressed the

43 Flynn and Arstein-Kerslake (n 15) 129.
44 Amnesty International & The Centre for Disability Law & Policy (n 25) principle 8.
45 Series (n 26).
importance of the relationship between the relevant person and their guardian.\textsuperscript{46} This matter seems to have been overlooked by the Bill.

Having regard to the provisions concerning the powers of restraint, Kelly says that the provisions are unclear as to in what situations the decision making representative would be using restraint in the first place.\textsuperscript{47}

An issue which may pose a great problem is the Bill’s interaction with the Mental Health Act 2001 (2001 Act). Section 2 of the 2001 Act defines a voluntary patient as a person receiving care in an approved centre who is not the subject of an admission order or a renewal order. Therefore, there is no requirement for capacity. Accordingly, a person may become a voluntary patient solely on the basis that a decision making representative has given consent on their behalf, and so they will not receive the statutory protection afforded to involuntary patients under the 2001 Act. This could be seen as an unlawful deprivation of liberty under Article 5(1) of the ECHR, and in turn is not permitted under section 27(7) of the Bill.\textsuperscript{48} The College of Psychiatrists of Ireland has stated that this relationship between the Bill and the 2001 Act needs to be clarified.\textsuperscript{49}

It is argued that there needs to be stricter safeguards put in place with regards to the decision making representative provisions of the Bill, so as to ensure that substituted decision making is a final resort. Furthermore, there needs to be more clarity in ensuring the Bill engages with the 2001 Act in a cogent manner.

\textsuperscript{46} Series (n 26).
\textsuperscript{47} Kelly (n 9) 11.
\textsuperscript{48} Kelly (n 9) 13.
\textsuperscript{49} College of Psychiatrists of Ireland (n 19).
G CONCLUSION

While it is accepted that the Bill is a welcome step forward for Ireland in its pursuit of ratification of the CRPD, it still presents some major stumbling blocks to this goal. It has been shown that, in its definition of capacity, the Bill still assumes that a certain standard of mental capacity is a prerequisite to achieving legal capacity. This is incompatible with Article 12 of the CRPD. Furthermore, the system of informal decision making is seen by some to act as a back door version of substitute decision making. Informal decision making's lack of statutory safeguards is quite the cause for concern, and one would hope this may be rectified before any Bill is passed. On the topic of co-decision makers, it is argued that the provisions have too many gaps in them to be effective with the 'will and preferences' model required by the CRPD. This idea, in theory, is a good system and may be effective were the flaws to be corrected. Having regard to Decision Making Representatives, it is contended that the safeguards in place are not stringent enough. It is conceded that there must be provision for a certain level of substituted decision making, but only where the 'will and preferences' of the relevant person are unknown and all available supports have been considered. As one of the motivating factors behind the introduction of the Bill was to introduce legislation in conformity with the CRPD, it would be a needless and wasteful use of both time and resources to pass a bill which would need significant amendments to enable Ireland to ratify the CRPD. It is proposed that the Oireachtas should give the criticisms of the Bill careful consideration before voting on it in order to make amendments to bring the Bill into line with Article 12 of the CRPD.